broad public interest in a competitive Internet backbone market. The only condition which will achieve that objective is the divestiture of UUNet.[51]

Initially, there is no doubt that MCI should be required to divest some part of the combined MCI/Sprint Internet business. Two years ago the proposed merger of MCI and WorldCom created a similar threat to Internet backbone competition. In that case, the FCC acted to promote a competitive Internet backbone market by approving the merger only on the condition that MCI divest its iMCI business. The European Commission, with the active support and endorsement of the Department of Justice, already had reached the same conclusion. In requiring the iMCI divestiture, the Commission implicitly rejected the alternative of adopting an intrusive regulatory regime to restrain the exercise of market power by the merged entity over the Internet backbone market. Such a regime would be costly for the Commission and the industry to implement, and the Commission's experience over several decades of regulating dominant carriers is that such regulations are a poor substitute for market forces in generating efficient outcomes and promoting the public interest. The choice between liberating market forces through divestiture and regulating a non-competitive Internet backbone market is in reality no choice at all – the Commission correctly selected divestiture as the appropriate regulatory tool.[52]

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51 The divestiture of UUNet was considered by the EC during its review of the MCI/WorldCom merger. *Telecoms: UUNet Must Be Sold for EC WorldCom/MCI Green Light*, Network Briefing (June 8, 1998); *WorldCom Needs More "Remedies" For Merger Approval, EC Says*, Wash. Telecom Newswire, Vol. 1, Issue 108 (June 5, 1998); *MCI May Expand Internet Sale to Answer European Antitrust Concerns*, Communications Daily, Vol. 18, Issue 109 (June 8, 1998).

52 *See generally* Jason Oxman, *The Commission and the Unregulation of the Internet*, FCC OPP Working Paper Series No. 31 (July 1999 ("Even though there are calls from numerous sources for the FCC to regulate the Internet, the Commission has a thirty-year tradition of encouraging its open and unregulated growth.")

While the MCI / WorldCom case provides a compelling precedent for divestiture in this case, C&W submits that the Commission should learn from past experience in deciding which Internet backbone assets – UUNet or Sprint – should be divested. C&W has a unique perspective because it was the purchaser of the iMCI business in 1998. Based upon its experience, C&W submits that three factors require the divestiture of UUNet rather than Sprint's Internet business.

First, in cases where business assets and operations are integrated into an entity's other activities, it is inherently problematic, if not futile, to suggest that forcing the divestiture of those assets will result in a viable stand-alone competitor from day one, particularly when the divesting entity will continue to compete in the same market segment. As discussed in detail below, even in a best-case scenario, such a divestiture requires enormous dedication and resource expenditures over many months on the part of the divesting entity. When the divesting entity is an unwilling seller, and will continue to compete against the divested company on a going-forward basis in a high-growth market segment, the likelihood that it will do what is necessary to ensure a robust stand-alone competitor from day one is so remote as to be non-existent.

C&W's concerns about the divestiture of integrated assets by MCI are not merely theoretical. As we document below, MCI took advantage of the integration between iMCI and the remainder of MCI to effectively sabotage the iMCI divestiture through a remarkable pattern of omissions, inattention, negligence and affirmative misdeeds, some of which bear a striking resemblance to the behavior of the ILECs in attempting to forestall local service competition. In particular, MCI failed to transfer key personnel, withheld essential contract documentation and other key customer information, and failed to provide key operational and systems support services– among other things. Because C&W did not receive a viable stand-alone Internet backbone business from MCI, C&W's ability to retain and expand its Internet business was compromised and competition in the Internet backbone market suffered to the detriment of U.S. consumers.

Without question, the tight integration between iMCI and the remainder of MCI was the key factor that enabled MCI to thwart the establishment of a robust competitor on the day of divestiture. Had iMCI been a stand-alone business, there would have been less need for post-divestiture interaction with MCI, and the ability of MCI to subvert the divestiture would have been constrained. Because Sprint's Internet business is integrated into Sprint's other operations, while UUNet functions as a more stand-alone business, the Commission should require the divestiture of UUNet to ensure that the merger of MCI and Sprint does not reduce the number and competitive strength of Internet backbone providers.

Second, the Commission should take into account the interests of MCI's and Sprint's current Internet backbone customers. The forced divestiture of an integrated business operation is not only problematic from a competitive perspective, it is highly disruptive to customers. For example, customers with multi-service contracts will be forced to re-write or even re-negotiate their existing contracts when they are transferred to the new company. In some cases, customers with multi-service volume discounts could end up paying higher overall prices when their contracts are allocated between the divesting and the divested entities. Further, when the divesting entity undermines the new company, as MCI has done with iMCI, customer disruption escalates geometrically – bills are incorrect, account representatives are unfamiliar with the customer or its contract, customer service inquiries are dropped, service problems take longer to resolve, etc. By contrast, when a stand-alone entity is divested, customer disruption is kept to a minimum; some customers may not even be aware that control of the provider has changed hands. As a result, the divestiture of UUNet rather than Sprint's Internet business would promote customer welfare.

Third, the nature of the divestiture directly affects the scope and nature of the conditions the Commission must impose and the monitoring and enforcement obligations it must undertake. Were the Commission to order MCI to divest the Sprint backbone operations, the Commission would be required to impose a complex series of granular conditions to ensure that the entity is fully divested as a robust, stand-alone competitor and that MCI provides the necessary support services on an ongoing basis for a year or more.[53] In effect, the Commission would have to supervise the establishment of a plan of reorganization to create the divested entity, and then actively monitor and implement that plan to ensure that the divested entity could function effectively as a strong backbone competitor. These intrusive and costly regulations would be similar in nature, scope and purpose to the Commission's ongoing regulation of incumbent local exchange carriers under Section 251 and related provisions in the Communications Act of 1934. Even with this level of Commission oversight, it is doubtful that the Sprint Internet backbone would be as strong a competitor on the first day of divestiture as it is in the market today.

By contrast, the divestiture of UUNet would entail considerably less ongoing Commission oversight and enforcement, and there is no doubt that UUNet would be just as strong a competitor on the first day of divestiture as it is today. To be sure, even for UUNet, C&W believes that the Commission should adopt baseline conditions to ensure that MCI fully divests the company and provides certain support services on a forward-looking basis. However,

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[53] There is precedent for many of these conditions in the Commission's Order approving the merger of SBC Communications and Ameritech. *See Ameritech Corp., Transferor and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines*, Memorandum Opinion and Order, CC Docket No. 98-141 (rel. Oct. 8, 1999) ("*SBC/Ameritech Order*").

such baseline conditions would be a far cry from the intrusive and complex regulatory regime that the Commission would have to establish to ensure that divesting the Sprint assets do not effectively eliminate a major competitor in the critical Internet backbone market.

B. It Is Highly Unlikely That The Forced Divestiture Of An Integrated Business Unit By An Entity Which Plans To Compete Against That Unit Will Succeed In Establishing The Divested Entity As A Robust Competitor From Day One

1. Divesting Integrated Internet Assets

The forced divestiture of an integrated business unit is an inherently problematic mechanism for mitigating or removing the anti-competitive impact of a telecommunications merger. This remedy is especially infeasible where the divesting company occupies a commanding position in the market sector in which the divested entity plans to compete on a going-forward basis.

With respect to the telecommunications marketplace, an integrated Internet backbone unit will share numerous critical resources with the company's telecommunications and other non-Internet business units. The same sales and marketing staff will sell Internet and other products, often combining them into a single contract with multi-service volume discounts. The same engineering staff will support all products offered by the carrier. The same account managers will interface with customers for all products offered by the carrier. The Internet backbone business will rely upon the parent company for billing and collection. The divested entity will lease transmission capacity from the parent company, and its critical equipment (*e.g.*, routers) will be located in the parent company's POPs. The databases necessary for customer provisioning and support will be shared with the parent company's other product lines. The divested entity will even share office space with the parent company, and rely upon it for administrative, information technology, procurement, and other overhead functions.

The forced divestiture of an integrated Internet backbone unit is highly unlikely to succeed in establishing a robust competitor on the day of divestiture. Such a divestiture cannot work unless the parent company expends enormous resources before and after the divestiture to make sure that the divested entity is a strong, stand-alone competitor. When the divestiture is forced, the divesting company is unlikely to allocate the resources necessary to do the job effectively. Given the enormity of the task, mere inattention will ensure that the divestiture fails.

Further, when the divesting company plans to compete in the same market as the divested unit on a going-forward basis, the divestiture is guaranteed to fail. The divesting company has an incentive to make sure that the divested company is a weak competitor on the day of divestiture, and to prolong as much as possible divested entity's dependence upon its previous owner for critical business inputs. It has multiple pressure points that it can use to ensure that the divested unit is a much weaker Internet backbone competitor than it was as an integrated business – it can transfer an insufficient number of employees, or transfer subpar personnel; it can withhold customer contracts; it can refuse to cooperate in persuading customers to assign their contracts to the divested entity; it can block or impede the divested entity's access to necessary databases for customer provisioning and trouble-shooting; it can limit or delay the divested entity's access to its equipment in the parent company's POPs; it can provide erroneous and delayed billing and collection services. The divesting carrier has numerous ways in which it can ensure that the divested entity will be a substantially weaker Internet backbone competitor on the day of divestiture than it was the day before.

Of course, in some situations the Commission might be able to rely upon the judicial or administrative process to deter the divesting party from sabotaging the divestiture of an integrated Internet backbone business. However, even those deterrents will not work effectively where the divesting entity occupies a commanding position in the Internet backbone market. Given the industry's explosive growth, such a carrier will gain far greater benefits from neutralizing the divesting entity as a future competitor than it will ever lose through damages or arbitration awards that it might have to pay, particularly since such payments can be tied up for years in litigation and appeals. Like a truck driver who willingly pays a fine in order to reap the financial benefits of driving an over-weight truck on public roads, an Internet backbone company with a commanding market position will gladly accept the risk of paying tens or even hundreds of millions of dollars in damages or awards for the lucrative opportunity to entrench its dominance in the Internet backbone market.

2. The Federal Trade Commission Study

The Federal Trade Commission ("FTC") has recognized the difficulty of mitigating the anti-competitive impact of a merger through a divestiture of assets that are not operated on a stand-alone basis. In a study last year, the FTC questioned whether a surgically-defined divestiture constructed from an integrated business would offset the anti-competitive effects of a merger.[54] The FTC concluded that "[d]ivestiture of an entire business is more likely to be successful than the divestiture of parts of a business," and that divesting the entire business is more likely to result in the "viable operation" of the divested entity.[55]

As the FTC recognized, it is extremely difficult in a forced divestiture to establish contractual requirements that guarantee the divested entity's operating viability. In particular, the FTC found that it is "difficult to specify in a contract all of the kinds of assistance that may be needed to transfer a business operation, especially if the transfer involves a complex

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54 *See* FTC, *A Study of the Commission's Divestiture Process* at 3 (1999).

55 *Id.* at 10, 14.

technology, or a business operation that is not fully transferred."[56] Similarly, the FTC recognized that it is problematic to expect that the divesting and divested entities will maintain the necessary cooperative relationship even while they compete head-to-head after the divestiture. The FTC concluded that such a relationship would be "inconsistent with the objective of maintaining or restoring competition."[57] Conversely, when "an entire business" is divested, the FTC found that it is far more likely that such a business will retain the employees and corporate knowledge to operate effectively on a stand-alone basis after the divestiture.[58]

In the context of this proceeding, the FTC's conclusions strongly support the divestiture of the least integrated Internet backbone operation. That is the only solution with the capability of producing a divested entity which can function as a strong, stand-alone competitor in the Internet backbone market.

C. MCI Must Fully Divest UUnet As A Viable Internet Business To Avoid The Anti-Competitive Effects Of The Proposed Merger

In the *MCI WorldCom Order*, the FCC recognized that the *full and complete* divestiture of the iMCI business was necessary to avoid the competitive harm posed by the proposed merger of MCI and WorldCom. The Commission found, after reviewing all relevant portions of the proposed divestiture agreement, that the agreement would "result in a full and complete divestiture of MCI's Internet assets" and thus would eliminate "the potential anticompetitive harms that would have resulted from the merger on the provision of Internet backbone services."[59] The Commission made clear that "the proposed divestiture...[must] in fact [be]

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56 *Id.* at 19.

57 *Id.* at 19.

58 *Id.* at 27-28.

59 *MCI WorldCom Order* at para. 156.

carried out" to avoid any anticompetitive effects.[60] In fact, MCI failed to honor its commitments to the Commission, the European Commission, the Department of Justice,[61] and C&W.

In this section, C&W documents its experience with the iMCI divestiture to underscore that divesting the integrated Sprint Internet assets is inherently problematic and will not promote the public interest in a broadly competitive Internet backbone market. C&W's experience strongly suggests that the behavior of MCI in divesting iMCI was not significantly different from that of the ILECs in "cooperating" in the provision of local service. The ILECs have no incentive to behave in a manner that will promote competition and thus throw up roadblocks to the establishment of effective local service competition in the form of inadequate support services, provisioning services, and the like. Similarly, MCI had no incentive to establish C&W as an effective competitor to UUNet in the Internet backbone market and thus did all it could to thwart the divestiture of iMCI.

C&W's experience with the iMCI is highly instructive for the proposed MCI/Sprint merger. The Commission should take away two primary lessons from that experience. *First*, MCI and Sprint must be required to divest the Internet backbone asset that is least integrated with their other telecommunications and non-Internet business activities. Most of the crippling blows that MCI inflicted on iMCI were facilitated by the tight integration between iMCI and MCI's other business activities. *Second*, the Commission cannot rely on MCI to honor its commitments to fully and completely divest an Internet backbone business. The Commission must require the divestiture that requires the least cooperation from MCI and is the easiest for the

60 *MCI WorldCom Order* at para. 142.

61 *Justice Department Clears WorldCom/MCI Merger After MCI Agrees to Sell Its Internet Business, Largest Divestiture of Company in Merger History*, Press Release, Dept. Of Justice (July 15, 1998).

Commission and the public to monitor through conditions on the merger approval.[62] Keeping in mind the old maxim "fool me once, shame on you, fool me twice, shame on me," the Commission should avoid being fooled again by MCI. The only way to promote the public interest in a broadly competitive Internet backbone market is to require MCI to divest UUNet.

Unlike the incentives created by section 271, any theoretical incentive MCI may have had in order to achieve merger approval was extinguished when the reviewing authorities attached no ongoing conditions to MCI's divestiture plan. Once the merger was approved, subject to divestiture of the MCI Internet assets, MCI's main incentive was to strengthen its own position in the Internet marketplace against all other competitors, including C&W. Like the ILECs, MCI was now positioned to play a key role in the ability of one of its main competitors to achieve success in the market. Moreover, like the ILECs not subject to the "carrot and stick" approach of section 271, MCI took a minimalist approach to fulfilling its obligations.

In documenting the debacle of the iMCI divestiture, C&W wishes to emphasize that it is not seeking to re-litigate its disputes with MCI before the Commission, nor is it soliciting the Commission's help in the litigations, arbitrations and proceedings that are moving forward in other fora. Stated plainly, C&W is making no request for relief from the Commission regarding its disputes with MCI. C&W is submitting this documentation solely to demonstrate that the divestiture of UUNet is necessary to promote market forces in the Internet backbone market, while divesting Sprint's Internet business would sacrifice a major Internet backbone provider and entrench MCI's dominance of this critical market segment.

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62 *See generally SBC/Ameritech Order*.

1. MCI's Commitment To Divest iMCI

As a condition of the approval of the European Commission. MCI and WorldCom entered into certain "Undertakings" whereby MCI agreed to sell its iMCI business to C&W.[63] The divestiture also was supported and endorsed by the Department of Justice. and sale of the iMCI business on the terms and conditions set forth in the Undertakings was an express condition of the FCC's approval as well.[64] The Undertakings required MCI to transfer to C&W "an operating entity" with "100% of the Internet traffic and 100% of the Internet revenues of the iMCI business," including iMCI's wholesale and retail dedicated Internet access business. consumer and business dial-up Internet access business. and other businesses such as web hosting. real broadcast network services, and managed firewall services.[65] As recognized by the Commission in the *MCI WorldCom Order*. such action entailed, among other things: (1) transferring all employees necessary to support the iMCI business; (2) transferring all of MCI's contracts with wholesale and retail customers for the provision of Internet access; and (3) making available to C&W all other necessary support arrangements to fulfill existing contractual obligations of the iMCI business and to accommodate the growth of that business.[66]

In sum. the Undertakings effectively required MCI to transfer to C&W a viable business capable of providing uninterrupted service to iMCI customers and of being an effective

63 The European Commission's approval is subject to the condition of "full compliance" with the Undertakings. Commission Decision of 8 July 1998 in Case No. IV/M.1069 – WorldCom/MCI at para. 165 ("*EC Decision*").

64 *MCI WorldCom Merger Order* at para. 227.

65 *EC Decision* at para. 136.

66 *MCI WorldCom Merger Order* at para. 151.

competitor in the Internet backbone market. However, as discussed below and as supported by the affidavits provided in Attachment A-K.[67] MCI did not fulfill its commitments.

2. MCI's Failure to Transfer All Necessary Personnel

MCI failed to transfer all personnel necessary to operate the iMCI business. Nearly two-thirds of the personnel that MCI offered to C&W were telephone representatives in a single call center providing support for the residential dial-up business. With respect to sales and sales support personnel, MCI transferred to C&W only 43 employees to support more than 3,300 dedicated Internet access customers. None of the transferred sales personnel had worked on MCI's 200 largest Internet accounts.[68]

The quality of the sales personnel transferred was inferior as compared to the rest of the MCI national sales force. The vast majority of the sales personnel that MCI made available to C&W ranked in the bottom half of MCI's national sales force, as reflected in MCI's internal computerized rankings. The lack of qualified and sufficient sales personnel to perform these functions on a timely basis resulted in customer dissatisfaction and loss of business, since sales and sales support employees were not available to provide traditional first-line support on day-to-day matters such as billing issues, troubleshooting, circuit upgrades, and account changes.[69]

MCI provided only two technical support consultants (required to formulate and present sales proposals, answer customers' and potential customers' technical questions, take and track

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67 These affidavits were compiled by C&W in connection with its complaint to the European Commission regarding MCI's failure to fulfill its commitments regarding the divestiture of iMCI. C&W also provides as Attachment A the affidavit of Rachel Rothstein, Vice President of Regulatory and Government Affairs for C&W, which attests to the veracity of the information provided in this section.

68 *See generally* Attachments B, C, D, Affidavits of Barberia, Bray, and Scavuzzo, respectively.

69 *Id.*

orders, and resolve problems for customers) for the entire United States. For some months after the divestiture, MCI's failure to transfer technical support personnel caused C&W to lose customers that needed technical assistance beyond the capabilities that MCI bequeathed to C&W at divestiture.[70]

MCI withheld most of its Internet engineering department, including personnel responsible for Internet security and anti-spamming functions. For a time, some networks refused to deliver electronic mail for C&W's customers because they viewed C&W as a potential source of spamming. MCI failed to provide key personnel from the project management and integration and test groups.[71] MCI failed to transfer sufficient management personnel, transferring only four managers to C&W to support the entire iMCI business.[72]

3. MCI's Failure To Transfer All Contracts

MCI failed to transfer all of iMCI's contracts to C&W.[73] Despite repeated urgent requests from C&W, MCI failed to provide C&W with over 2,000 written customer contracts – half of all the contracts produced to date – until at least seven months after closing. Only after C&W sought relief from the European Commission did MCI finally disclose (in April 1999) thousands of previously unproduced Internet contracts. More than 17 months after the

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70 *Id.*

71 *See generally* Attachment E, Affidavit of Catoe.

72 *See generally* Attachment B, C, D, Affidavits of Barberia, Bray, and Scavuzzo, respectively.

73 *See* Attachment B, Affidavit of Barberia.

divestiture closing. C&W is still without contract documentation for 755 of its dedicated access customers.[74]

Similarly, MCI failed to provide basic customer service information about customers of the iMCI business, including information such as decision-maker/key customer contacts, revenue and billing information, customer support records, sales representatives' records, status of customer orders, promotions and prospects information, accounts receivable and payment history, and marketing materials and records.[75] MCI even failed to inform C&W as to the existence of certain customers. To date, C&W has identified 168 contracts with 70 customers that were not included on the original customer list.

Without essential contract documentation and customer service information, C&W did not know its customers' contractual terms, such as the Internet circuits or other services for which the customer agreed to pay, the agreed prices of such services, any applicable discounts, and contract termination dates. In some cases, C&W could not provide service because MCI failed to disclose the identity of the customer to C&W at divestiture. As a result, C&W lost revenues and profits, missed contract renewals and other opportunities to sell Internet services, and suffered harm to its customer relationships, goodwill, and reputation in the marketplace.

In addition, MCI did not use its best efforts to obtain the consent of iMCI customers to assign their contracts to C&W, and also failed to remit revenue from unassigned contracts.[76] C&W has identified at least 56 accounts that still have not been properly assigned.

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74 Many of the contracts that MCI WorldCom has provided are incomplete, out of date, and/or missing amendments, addenda, or circuit agreements. No originals were ever provided. *Id.*

75 *Id.*

76 *See* Attachment F and D of Rogers, Scavuzzo, respectively.

4. MCI's Failure to Provide Database Access, Provisioning Support, And Necessary Documentation in Support of the Business

An Internet backbone business requires the development and use of sophisticated databases to facilitate essential functions such as customer provisioning and customer service inquiries. MCI restricted, denied, or delayed database access to large numbers of C&W personnel. Many C&W personnel (particularly sales personnel) were not given a "RACF ID" – a user identification code needed for access to MCI databases – or they were given a code that did not work. The lack of operable RACF IDs kept C&W from providing timely answers to customer inquiries.[77]

MCI denied many C&W employees access to specific databases, such as the CSM database which is essential for trouble-shooting customers' dedicated access circuits. MCI also blocked C&W's efforts to create its own customer information systems by stalling the transition and providing inaccurate and incomplete information.[78] At certain call centers, MCI physically removed certain resource management systems (used to generate and manage schedules for call center employees or to monitor customer service transactions for quality control and training purposes) just prior to closing.[79]

MCI also failed to supply necessary documentation in support of the business at closing. Among other things, MCI destroyed Internet-related documents that were crucial to the operation of call centers being transferred to C&W, such as training documents, employee handbooks, human resource policies and procedures, product information and brochures, pricing information, performance reports, and budget information. At one call center, MCI erased from

77 *See* Attachment D, Affidavit of Scavuzzo.

78 *See* Attachment G, Affidavit of Wenneman.

79 *See* Attachment H, Affidavit of Raley.

the computers certain historical data, including customer performance data necessary for employee evaluations, prepare budgets, and predict staffing needs. The result is that these call centers could not be operated at prior performance levels after the iMCI divestiture, and C&W was forced to devote resources to rebuilding processes, procedures, and training materials from scratch.[80]

Lastly, MCI failed to provide adequate provisioning support to C&W. MCI has either refused or delayed responses to C&W's requests for DS3 circuits to serve Internet customers.[81] MCI also dropped numerous orders for installations, disconnects, and upgrades that were due to customers in the three-month period prior to closing.[82]

5. MCI's Failure To Provide Billing Services

The customer billing services provided by MCI to C&W have been flagrantly inadequate.[83] Bills for dedicated access services have been delayed for up to six months. When received, these bills have been riddled with errors, including failure to give discounts for which customers contracted, failure to issue promised credits, failure to reflect payments or cancellation of service, double billing, and overcharges. Billing problems have forced C&W's sales force to spend much of their time dealing with customers' billing issues and have alienated a significant number of C&W's dedicated access customers. Hundreds of dedicated Internet access customers are still withholding millions of dollars from C&W because of billing problems.

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80 *Id.*

81 *See* Attachment I, Affidavit of Nichols.

82 *See* Attachment J, Affidavit of Dixon.

83 *See* Attachment C, Affidavit of Bray.

Similarly, MCI's billing services for dial-up customers have been deficient.[84] Bills for these customers have been two to three months late. A large percentage of the bills reflect errors, including incorrect monthly fees, duplicate billing, failure to post credits, charges for services that had been cancelled, and charges for long distance access where the customer's plan was limited to free local access. Between closing and February 16, 1999, approximately 42,000 residential dial-up customers cancelled their Internet service because of billing problems caused by MCI.

6. The Impact Of MCI's Failure To Fulfill Its Commitments

The severe adverse impact on C&W of MCI's pattern and practice of non-compliance with its commitments regarding the iMCI divestiture is readily apparent. The iMCI business transferred to C&W was a significantly weaker competitor as a stand-alone business than as an MCI operating unit. C&W's ability to retain and expand its Internet business was undermined by the lack of adequate and sufficient personnel, information, and services. While iMCI experienced growth rates of 50-100 percent prior to divestiture, this dramatic growth abruptly ceased after the sale of the business to C&W. From September 1998 through July 1999, the customer base in each of C&W's Internet businesses fell, and revenues were either flat or declining.

C&W has now stopped this downward trend, but only by accelerating its planned $700 million investment in the network and by recruiting and training many new employees over the last year. Still, the damage to the Internet backbone market has been significant. C&W's market position today is significantly inferior to the position it would have occupied had MCI fulfilled its commitments to divest iMCI as a business capable of operating on a stand-alone basis at the

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84 *See* Attachment K, Affidavit of Brown.

time of transfer. The beneficiary, of course, was MCI's other Internet operations, including UUNet, which seized a larger share of the growth in the Internet backbone market than they would have earned had iMCI been divested as a robust, stand-alone competitor. At the end of the day, the Internet backbone market was significantly less competitive after the iMCI divestiture than before, to the ultimate detriment of U.S. consumers and the Commission's policy objectives in approving the MCI merger.

E. Since Sprint's Internet Business Is More Integrated Than UUNet With The Businesses That Will Be Retained, MCI And Sprint Should Be Required To Divest UUNet As A Condition Of The Merger

C&W submits that information available in the industry today provides a sufficient record foundation for the Commission to conclude that Sprint's Internet business is more tightly integrated into the parties' other telecommunications activities than is UUNet. To the extent the Commission determines that it would be useful to supplement the record, C&W urges the Commission to require the applicants to provide the necessary information. In the following sections, C&W provides basic information on UUNet and Sprint that it has obtained in the normal course of its operations in the industry (*e.g.*, from customers, former employees, and other industry participants).

1. The Sprint Internet Business

Like iMCI, the Sprint Internet business has its origins in Sprint's mainstream telecommunications business. Sprint's Internet business evolved from the Telenet data business and, like the pre-divestiture iMCI, it operates over the same network facilities as the parent company's other telecommunications services. We believe that a substantial number of Sprint's POPs are used for both Internet and non-Internet services.

Sprint's Internet business appears to be well integrated with functions that support Sprint's other telecommunications businesses. It is our understanding that there is no separate sales force for Internet services – rather, the sales and sales support teams that promote Sprint's data products also sell and support Sprint's Internet service offerings. Similarly, Sprint's data services and Internet services rely on the same customer service and network management centers for support, and they also share back-office support functions, such as provisioning. It appears that databases of customer information also are maintained on an integrated basis. Sprint's comments on the MCI / WorldCom merger confirm that Sprint's Internet and non-Internet businesses share resources in many areas.[85]

2. UUNet

The origins of UUNet and its relationship to MCI stand in sharp contrast to the origins and corporate relationships of the Sprint Internet business. UUNet was established as a stand-alone Internet services provider. UUNet has no background as a telecommunications company; it only became affiliated with a telecommunications company when it was purchased by MFS in

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85 In its comments, Sprint stated that:

> Sprint ... employs ___ sales people, and over ___ sales support personnel who devote *part* of their time selling and supporting Internet customers. Sprint has hundreds of *shared* customer service personnel who support ordering, provisioning, implementation, billing and trouble management. Additionally, its core Internet backbone is supported by hundreds of *shared* personnel who work on underlying infrastructure, ranging from the fiber optic network facilities, entrance facilities connecting its Points of Presence to its backbone nodes, and SONET and Wave Division Multiplexing facilities. Sprint also employs hundreds of *shared* personnel who develop and support the underlying systems associated with the Internet services.

Applications of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications to WorldCom, Inc., Comments of Sprint Corp. CC Docket No. 97-211, filed June 11, 1998, at 9-10 (omissions in the original; emphasis supplied).

1996. The information provided on UUNet's web site suggests that UUNet has been maintained by MCI as a structurally separate subsidiary.[86]

Unlike the Sprint Internet business, UUNet does not appear to be substantially integrated into MCI. Rather, UUNet continues to control its own largely separate backbone facilities, consisting of capacity leased on a long-term basis from the lowest cost provider. Some of its points of presence (POPs) are located in the facilities of carriers other than MCI. While UUNet may now look primarily to MCI for additional capacity, UUNet continues to operate the bulk of its network as before. New POPs are located in MCI central offices, but as in the case of new capacity, UUNet has not migrated its pre-existing POPs to MCI's facilities. Even where UUNet's facilities are collocated in MCI POPs, the UUNet equipment is separately placed and identified.

Further, C&W believes that UUNet personnel is separate from MCI staff. In particular, UUNet largely employs its own sales and support staff that compete directly with MCI sales staff. With the apparent exception of the top national accounts, MCI's and UUNet's sales people separately solicit new and existing customers. Indeed, it is C&W's understanding that other than for the top accounts MCI's sales people are prohibited from contacting UUNet customers without the permission of the UUNet account representative. Similarly, UUNet and MCI contract separately with most of their joint customers.

We understand that UUNet also maintains its own technical and engineering staff, as well as its own network management centers. Indeed, UUNet often will not allow MCI personnel to

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86 The fact that UUNet maintains its own web site (www.uu.net) separate and apart from the web site of MCI WorldCom (www.wcom.com) is noteworthy in and of itself. Apart from identification of UUNet as an MCI WorldCom subsidiary and links to MCI WorldCom's own web site, UUNet's web site is remarkably bereft of information concerning MCI WorldCom.

install UUNet equipment, even when such equipment is located in MCI's POPs. UUNet has its own product development and marketing departments, and it is allowed to develop and deploy products without the approval of MCI. UUNet also appears to have its own customer service centers and personnel. It is C&W's understanding that basic customer information such as circuit IDs, key customer contacts, billing information, and order status is maintained in databases that are separate and apart from MCI's. The principal support function and database that is shared between MCI and UUNet is customer billing (*i.e.*, the same MCI billing system issues both MCI and UUNet bills).

3. The Divestiture Of UUNet Would Better Promote Competition In The Internet Backbone Market And Thus Would Better Serve The Public Interest

The information provided above shows that Sprint's Internet business is integrated into Sprint's other telecommunications businesses in the same way that iMCI was integrated into MCI's other businesses, while UUNet historically has operated, and operates today, on a more stand-alone basis. In these circumstances, the Commission must require the full and complete divestiture of UUNet as a condition of approving the merger between MCI and Sprint. Because UUNet still operates as a stand-alone company, MCI has far more limited opportunities to sabotage the divestiture with the result that, assuming modest Commission oversight of the divestiture process, UUNet will be a strong and vibrant Internet backbone competitor at the time it is divested. By contrast, divesting the Sprint Internet backbone business would give MCI the same opportunity that it had with iMCI to ensure that the divested company is a weaker competitor than it was when operated on an integrated basis, a handicap that will require one to two years for the new owners to overcome.

Were it to order the divestiture of Sprint's Internet business rather than UUNet, the Commission would need to take a much more active role in supervising the divestiture and its implementation over a one- to two-year period. As demonstrated by C&W's experience with the iMCI divestiture, MCI has multiple pressure points for ensuring that the divested Sprint Internet backbone assets cannot function as a strong competitor for months if not years after divestiture. The FCC would be required to establish a detailed Plan of Reorganization and then to monitor, implement and enforce that plan for several years. Even that level of effort is unlikely to succeed beyond eliminating the worst abuses that MCI demonstrated with the iMCI debacle. The only way to generate vibrant competition from the divested entity is to ensure that it operates on a stand-alone basis as soon as possible after divestiture, and UUNet is unquestionably in a better position than the Sprint Internet backbone assets to function on a stand-alone basis from day one forward. Rather than incur enormous costs to achieve a substandard result through divesting the Sprint asset, the Commission can achieve a strong pro-competitive result with only a modest expenditure of public and private resources through the divestiture of UUNet.

F. To Ensure That The Parties Fully Divest UUNet, The Commission Should Condition Its Approval On Compliance With Specific Divestiture Conditions And Enforcement Requirements

Based on the problems of the iMCI divestiture, the Commission must take an active role in supervising the divestiture of UUNet. Fortunately, because UUNet is operated largely on a stand-alone basis, the Commission can ensure a pro-competitive result by adopting and enforcing a set of baseline divestiture standards and conditions. This Commission oversight is necessary because MCI has no incentives to cooperate in the divestiture of a vibrant Internet backbone competitor, and in fact it has incentives, as witnessed by the iMCI experience, to sabotage the divestiture in any way it can. C&W's recommendations in this regard are set forth below.

1. Review Of Relevant Documents

Any proposed agreement to divest UUNet should be supplied to the FCC along with all supporting schedules and documentation. The Commission should make the agreement available to the public for review (subject to a protective order) and should take comments on the document. Such a procedure is no different than the procedure followed by the Commission in the MCI / WorldCom proceeding.

2. Commitment To Divest, And Verifiable Fulfillment Of That Commitment

MCI and Sprint must commit to fully divest UUNet as an independent operating entity with 100 percent of the Internet traffic and 100 percent of the Internet revenues of the UUNet business. In general, the commitments made by the parties in this case must be no less than the commitments made by MCI and WorldCom in obtaining approval for their merger.

However, this time the Commission must put the necessary mechanisms in place to define the divestiture commitments of the parties and ensure that the parties fulfill them. As a starting point, MCI should be required to submit to the FCC and the purchasing party a list of customers, employees, and assets being transferred and telecommunications and other support services being provided to the purchaser of UUNet at closing. Further, to prevent MCI from stripping UUNet of valuable employees, assets and resources prior to the divestiture, the Commission should prohibit all transfers of employees, assets and resources from UUNet to MCI, Sprint or any affiliated entities as of January 1, 2000. In addition, both sets of parties – the Combined Carrier and the purchaser of UUNet -- should be required to submit public reports to the Commission on the progress of the divestiture and any problems they are encountering.

3. Independent Audit

To ensure full compliance, an independent auditor must be appointed to review the Combined Carrier's compliance with the divestiture conditions after three months and again after one year. The auditor should be approved by the Chief of the Common Carrier Bureau and its expenses ultimately borne by the Combined Carrier. The FCC should require the auditor to promptly submit a written report to the Commission after each audit. To ensure that the auditor is able to prepare an accurate report, the FCC should make clear that the auditor will have open access to the parties' and the purchasers' books, employees, facilities, files, and electronic databases. Use of an independent auditor to verify compliance with FCC-imposed merger conditions is well-established. For example, the FCC recently required periodic independent audits in approving the merger of SBC and Ameritech.[87]

4. Corporate Compliance Program

In the *SBC/Ameritech Order*, the Commission required the newly merged SBC/Ameritech to establish a corporate compliance program "to identify all applicable compliance requirements, establish and maintain the internal controls needed to ensure compliance, evaluate the merged firm's compliance on an on-going basis, and take any corrective actions necessary to ensure full and timely compliance."[88] The company was required to appoint a "compliance officer" with sufficient ranking to ensure compliance, and that officer was required to file annual reports with the Commission describing the company's compliance

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87 *See SBC/Ameritech Order* at paras. 410-11.

88 *SBC/Ameritech Order* at paras. 407-08.

with the merger conditions and the sufficiency of the firm's internal controls.[89] Particularly given MCI's failure to adhere to its commitments to divest iMCI as a fully-functioning Internet backbone provider on the day of divestiture, a similar compliance program is necessary here. Reviewing the work of the compliance officer and the efficacy of the corporate compliance program would be the responsibility of the independent auditor.

5. Adoption Of These Divestiture Conditions And Enforcement Requirements Will Serve The Public Interest

To preserve effective competition and protect the interests of the public, the FCC must be in a position to ensure that MCI actually divests UUNet as a complete and viable stand-alone business. The conditions and requirements proposed herein will define and enforce compliance with a divestiture standard by specifying precisely what assets, personnel, etc. are to be divested and by providing a third party – the independent auditor – to ensure that the parties actually fulfill their divestiture commitments.[90] As such, these conditions and requirements will provide additional assurance that UUNet is fully and completely divested as an effective competitor in the Internet backbone market.

V. The Commission Is Obligated To Review The Internet Backbone Aspect Of The Sprint / MCI Merger

In reviewing the proposed merger, the Commission has a statutory obligation to determine whether the present or future public interest requires or will require the Commission's approval. Sprint and MCI have applied for Commission consent to transfer Sprint's Section 214 authorizations, radio licensees and cable landing licensees to MCI. Under Sections 214 and

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[89] *SBC/Ameritech Order* at para. 408.

[90] Conditions should also include a dispute resolution method similar to that imposed by the Commission in its *SBC/Ameritech Order*. *Id.* at para. 499.

310(d) of the Communications Act of 1934, as amended, (the "Act") and the Submarine Cable Landing Act, the Commission cannot transfer control of these authorizations and licenses unless the proposed merger would serve the public interest.[91] More specifically, Section 214(a) compels the Commission to deny the application unless the "present or future public convenience and necessity require or will require" its approval.[92] Likewise, Section 310(d) of the Act requires the Commission to deny the application unless the proposed merger "serves the public interest, convenience, and necessity."[93]

It is well settled that the public interest, convenience and necessity standard is flexible, and that the Commission must construe it so as "to secure for the public the broad aims of the Communications Act."[94] These broad aims include, among other things, "accelerating rapidly private sector deployment of advanced telecommunications and information technologies and services"; establishing a "pro-competitive, deregulatory national policy framework designed to . . . open[] all telecommunications markets to competition"[95]; and making "available . . . to all the people of the United States . . . a rapid, efficient, nationwide, and world-wide . . . communication

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91 47 U.S.C. §§ 34-39, 214(a), 303(r), 310(d) (1994). *See AT&T Corp., BT, VLT Co., TLTD and License Co.*, 1999 FCC Lexis 5428 (Oct. 29, 1999) ("*AT&T/BT Order*"); *Teleport Communications Group, Inc., Transferor, and AT&T Corp., Transferee*, 13 FCC Rcd 15,236 (1998) ("*AT&T/TCG Order*"); *MCI WorldCom Merger Order* at para. 8; *Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd 19,985, 19,987 at paras. 29-36 (1997) ("*Bell Atlantic/NYNEX Order*").

92 47 U.S.C. § 214(a).

93 47 U.S.C. § 310(d).

94 *NYNEX-Bell Atlantic*, 12 FCC Rcd at 20002, para. 31 (*citing Western Union Division, Commercial Telegrapher's Union, A.F. of L. v. United States*, 87 F. Supp. 324, 335 (D.D.C. 1949), *aff'd* 338 U.S. 864 (1949)); *Washington Util. and Transp. Comm'n v. FCC*, 513 F.2d 1142, 1147 (9th Cir. 1975); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953).

95 H.R. Rep. No. 104-458 at 1 (1996); Telecommunications Act of 1996, Pub. L. No. 104-104 (preamble), 110 Stat. 56 (1996).

service . . . ."[96] Accordingly, the Commission must consider whether the proposed merger will affect the quality of services provided to consumers, or will result in the provision of new or additional services to consumers.[97] The Commission must also consider "the trends within, and needs of, the telecommunications industry, the factors that influenced Congress to enact specific provisions of the Act, and the nature, complexity, and rapidity of change in the telecommunications industry."[98]

The public interest standard necessarily encompasses the goal of promoting development of the Internet and advanced telecommunications services by protecting competition in the Internet backbone market,[99] as Sprint itself agrees. For example, Sprint vehemently argued in its comments on the WorldCom/MCI merger that (1) the Commission has the jurisdiction to consider the competitive implications of proposed mergers on the Internet backbone market, (2) the Internet backbone market is a separate market, and (3) the Commission has the authority to require divestiture of Internet backbone facilities as a merger condition.[100] The Commission also has recognized its jurisdiction to consider anticompetitive effects on the Internet backbone

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96 47 U.S.C. § 151 (1997). These goals date to the original Communications Act of 1934. *See* H.R. Rep. No. 1918 (1934).

97 *See, e.g., AT&T/BT Order* at para. 14; *MCI WorldCom Order*, 13 FCC Rcd at 18,031, para. 9; *AT&T/TCG Order*, 13 FCC Rcd at 1523, para. 11; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063, para. 205 (describing "lower prices, improved quality, enhanced service or new products" as examples of consumer benefits resulting from merger-specific efficiencies that are relevant to the public interest analysis").

98 *AT&T/BT Order* at para. 14 (citing *MCI WorldCom Merger Order*, 13 FCC Rcd at 18,031, para. 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,003, para. 32; *BT/MCI Order*, 12 FCC Rcd at 15,365, para. 29).

99 *NYNEX-Bell Atlantic*, 12 FCC Rcd at 20002-03, para. 31 ("[T]he public interest standard necessarily encompasses the goal of promoting competition . . . .").

100 *Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications to WorldCom, Inc.*, Comments of Sprint Corporation, CC Docket No. 97-211, 2-6 (filed March 13, 1998).

market as part of a merger analysis and its authority to order divestiture of Internet assets as a merger condition.[101]

In applying the public interest, convenience and necessity standard, the Commission "must determine whether the proposed transaction violates [its] rules, or would otherwise frustrate [its] implementation or enforcement of the Communications Act and federal communications policy. That policy is, of course, shaped by Congress and deeply rooted in a preference for competitive processes and outcomes."[102] Ultimately, the statutory standard that the Commission must apply here requires a balancing of the potential public interest harms against the potential public interest benefits, and Sprint/MCI bear the burden of proof of showing that the benefits outweigh the harms.[103] Sprint and MCI have not satisfied their burden of proof, because the potential harms of the proposed merger will outweigh the potential benefits unless the MCI's Internet backbone is divested, *i.e.*, UUNet.

If the Commission determines that the Sprint/MCI application would serve the public interest only if particular conditions are met, including divestiture of MCI's Internet backbone, it can grant the application subject to compliance with those conditions.[104] Section 214(c) of the

101 *MCI WorldCom Merger Order*, 13 FCC Rcd at 18,103-04, para. 142.

102 *AT&T/BT Order* at para. 15.

103 *AT&T/BT Order* at para. 15 *citing MCI WorldCom Merger Order*, 13 FCC Rcd at 18,031-32, para. 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,000, 20,063, paras. 29, 157; *BT/MCI Order*, 12 FCC Rcd at 15,365, para. 29.

104 *See, e.g., NYNEX-Bell Atlantic*, 12 FCC Rcd at 20002, para. 30 ("If the Commission is able to determine that the application would serve the public interest if particular conditions are met, the Commission can grant the application subject to compliance with the specified conditions."); *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 268 (D.C. Cir. 1986) (holding that "the Commission may impose conditions whenever in the absence of such conditions the transfer would not be in the public interest. Indeed, in such circumstances unconditional approval would presumably be arbitrary and capricious and therefore could be set aside under the APA." (footnotes omitted)); *Amendment of Section 2.106 of the Commission's Rules To Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, 13 FCC Rcd 23949, 23956, para. 16 (1998) ("As an initial matter we note that,

Act directs the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[105] Similarly, the Commission routinely imposes conditions deemed necessary to guard against possible anticompetitive conduct when approving applications for authority to transfer station licenses pursuant to Section 310(d).[106] The Commission has frequently exercised this authority to impose conditions intended to prevent future transgressions of 310(d) whenever in the absence of the conditions the transfer would not be in the public interest.[107] In fact, where the requested transfer would not be

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pursuant to the Communications Act of 1934, as amended, this Commission has authority to impose on Commission licensees conditions and obligations consistent with the public interest, convenience and necessity, including monetary obligations."), *citing Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C.Cir. 1996), *cert. denied*, 117 S. Ct. 81 (1996); *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989); *North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985); *NYNEX-Bell Atlantic*, 12 FCC Rcd 19985. *See also Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990) (finding that Section 311(c), which provides in relevant part that "[t]he Commission shall approve the agreement only if it determines that . . . the agreement is consistent with the public interest, convenience, or necessity", permits it to impose settlement limitations in the public interest).

105 47 U.S.C. § 214(c). *See, e.g., AT&T/BT Order* at para. 15 *citing MCI WorldCom Merger Order*, 13 FCC Rcd at 18,032, para. 10; *MCI Communications Corp.*, 9 FCC Rcd 3960, 3968, para. 39; *Sprint Corp.*, 11 FCC Rcd 1850, 1867-72 paras. 100-33 (1996); *GTE Corp.*, 72 FCC 2d 111, 135, para. 76 (1979).

106 *See, e.g., Tele-Communications, Inc., and TeleCable Corporation Transfer of Control*, 10 FCC Rcd 2147, 2147, para. 1 (1995) ("[T]he Bureau finds that, subject to certain conditions, approving the proposed license transfers will serve the public interest, convenience and necessity. Therefore, the Bureau grants the transfer applications. In so doing, however, the Bureau imposes a condition that it determined to be necessary to guard against otherwise possible anti-competitive conduct."); *Jefferson-Pilot Corp. v. Commissioner*, 995 F.2d 530 (4th Cir. 1993)(discussing FCC approval of assignment of licenses pursuant to Section 310(d) subject to certain conditions and payment of a transfer fee); *Ramsay v. Dowden (Central Arkansas Broadcasting Co.)*, 68 F.3d 213, 214-15 (8th Cir. 1995) (noting that an FCC license is granted and may be transferred pursuant to Sections 307(c) and (d) and 310(d) subject to restrictions and conditions). *See also, e.g., Infinity Broadcasting Corp.*, 12 FCC Rcd 5012 (1996) (imposing conditions on a license transfer pursuant to Section 310(d)); *Citicasters, Inc.*, 11 FCC Rcd 19135 (1996) (same); *Pyramid Communications, Inc.*, 11 FCC Rcd 4898 (1995) (same).

107 *Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803, 809 (D.C. Cir. 1990) (explaining Commission's broad discretion under Section 310(d) to

in the public interest, as is the case here, "unconditional approval would presumably be arbitrary and capricious and could therefore be set aside under the APA."[108]

In addition to its authority under Sections 214(c) and 310(d), the Commission derives authority to impose conditions on approval of Sprint/MCI/WorldCom's proposed transfer from multiple statutory provisions, including Sections 303(r), 154(i) and 201(b) of the Act, the Submarine Cable Landing Act and Executive Order No. 10530.[109] Section 303(r) expressly authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions of this Act . . . ."[110] Similarly, Section 154(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[111] Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to

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impose conditions on transfers); *U S West, Inc. v. FCC*, 778 F.2d 23 (D.C. Cir. 1985) (dismissing challenge of FCC order granting application subject to reporting condition and recognizing FCC authority to impose conditions solely pursuant to Section 310(d)); *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1492-93 (D.C. Cir. 1995) (recognizing implicitly the Commission's authority to impose conditions pursuant to 310(d)).

108 *GTE Serv. Corp.*, 782 F.2d at 268.

109 *See, e.g.*, *Ameritech Michigan Order*, 12 FCC Rcd at 20741-45 (explaining breadth of Commission discretion in making public interest determinations). Sections 303(r) and 154(i) confer upon the Commission "'not niggardly but expansive powers' and wide discretion to adopt flexible procedures, rules and orders to meet ever-changing communications needs . . . ." *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142, n. 23 (9th Cir. 1975), *citing National Broadcasting Co. v. United States*, 319 U.S. 190, 210-214 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956).

110 47 U.S.C. § 303(r) (1999).

111 47 U.S.C. § 154(i) (1999).

carry out the provisions of this Act."[112] In addition, the Submarine Cable Landing Act[113] and Executive Order No. 10530[114] authorizes the Commission to grant, withhold, or condition cable landing licenses, *interalia*, "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed."[115] In sum, "the Commission's public interest authority enables it to rely upon its extensive telecommunications regulatory and enforcement experience to impose and enforce certain types of conditions that tip the balance and result in a merger yielding overall positive public interest benefits."[116]

Courts have consistently found in the Act a Congressional intent to grant the Commission broad discretion in imposing conditions necessary to ensure that requested authorizations are consistent with the public interest, convenience and necessity.[117] Because Congress has granted

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112 47 U.S.C. § 201(b) (1999).

113 47 U.S.C. §§ 34-39.

114 Exec. Ord. No. 10,530, *reprinted as amended in* 3 U.S.C. § 301 *et seq.*

115 47 U.S.C. § 35. *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23,891, 23,933-35, paras. 933-96 (1997)("Foreign Participation Order") (discussing Commission's authority to impose conditions on submarine cable licenses).

116 *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, 14 FCC Rcd 14712, para. 52 (1999), *citing WorldCom/MCI Order*, 13 FCC Rcd at 18034-35, para. 14.

117 *See, e.g., Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389-90 (D.C. Cir. 1995) (upholding FCC imposition of proportionate return condition on carrier's 214 authorization to provide international service. "[W]e see no basis for concluding that the Commission acted arbitrarily and capriciously when, in the exercise of its judgment of what the public convenience and necessity required, it decided to offset the risk [that the carrier would use its ability and incentive to discriminate against competing domestic carriers] by imposing a proportionate return condition."); *Western Union Tel. Co. v. FCC*, 541 F.2d 346, 355 (3rd Cir. 1976)(affirming FCC's imposition of a waiver as a condition to issuance of a 214 certification. "The gravamen of the [Western Union] argument is that such an interpretation [allowing the FCC to impose a waiver of contract as a condition] would allow the Commission to do 'indirectly' by condition what it is forbidden to do 'directly' by tariff, viz., modify or abrogate contracts. The argument fails because of the brute fact that there is a significant difference between a voluntary waiver of rights in order to secure a benefit otherwise unobtainable, and the extinguishment of rights by tariffs which provide no *quid pro quo* . . . ."(citations omitted)).

the Commission broad discretion in determining how to achieve the goals of the Act, courts decline to substitute their views on the best method of achieving those goals.[118] The Supreme Court has characterized the public-interest standard of the Act as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."[119] The public interest, convenience and necessity standard "no doubt leaves wide discretion and calls for imaginative interpretation. Not a standard that lends itself to application with exactitude, it expresses a policy . . . that is 'as concrete as the complicated factors for judgment in such a field of delegated authority permit.'"[120] Therefore, the Commission may "implement its view of the public-interest standard of the Act 'so long as that view is based on consideration of permissible factors and is otherwise reasonable.'"[121] Finally, the Supreme Court has repeatedly recognized that "the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support

118 *See, e.g., National Broadcasting v. United States,* 319 U.S. 190, 217-18 (1943) (declining to substitute its views on the best method of encouraging how to achieve the statutory goals of the Act). *See also FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 594 (1981) (explaining breadth of the Commission's discretion in applying the public interest standard); *Mobile Communications Corp. of America v. FCC,* 77 F.3d 1399, 1406 (D.C. Cir. 1996) (same); *GTE Serv. Corp. v. FCC,* 782 F.2d 263, 268 (D.C. Cir. 1986) ("[B]ecause the scope of judicial review over such agency determinations is narrow, GTE bears a substantial burden in showing that a grant without the four conditions was arbitrary and capricious. It cannot be gainsaid that this court is required to give substantial deference to decisions of the FCC, particularly where, as here, the Commission has determined that a particular course is or is not in the public interest."); *Committee to Save WEAM v. FCC,* 808 F.2d 113, 116-17 (D.C. Cir. 1986) (dismissing challenge to FCC's public interest finding under Section 310(d)).

119 *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (*quoted in FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 593-94 (1981)).

120 *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953) (*quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)).

121 *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 594 (1981), *quoting FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 793 (1978). *See Office of Communication of the United Church of Christ v. FCC,* 911 F.2d 803, 809 (D.C. Cir. 1990) ("The Commission has broad discretion not only to define the public interest, but also to determine which *procedures* will best assure its protection.").

for the Commission's ultimate conclusions is not required since 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'"[122] Consequently, the Commission has the authority, and indeed the responsibility, to require divestiture of MCI's Internet backbone as a condition of approval of the Sprint/MCI merger application.

VI. Conclusion

For the foregoing reasons, the Commission should approve the merger of Sprint and MCI only if it imposes the conditions necessary to preserve and promote Internet backbone competition through the divestiture through the divestiture of MCI's internet subsidiary, UUNet.

Respectfully submitted,

CABLE & WIRELESS, INC.

By:
Robert J. Aamoth
Paul G. Madison
Joan M. Griffin
W. Joseph Price
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

Rachel J. Rothstein
Brent M. Olson
Cable &Wireless, Inc.
8219 Leesburg Pike
Vienna, VA 22182
(703) 760-3865

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122 *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 594-95 (1981) (*quoting FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), *in turn quoting FPC v. Transcontinental Gas Pipe Line Corp.*, 364 U.S. 1, 29 (1961)).